

Served: June 2, 1992

NTSB Order No. EA-3569

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 11th day of May, 1992

BARRY LAMBERT HARRIS,
Acting Administrator,
Federal Aviation
Administration,

Complainant,

SE-9713

v.

LANG ENTERPRISES, INC.

Respondent.

OPINION AND ORDER

Administrator has appealed from the oral initial decision of Administrative Law Judge Patrick G. Geraghty, rendered at the conclusion of an evidentiary hearing on January 23, 1990.¹ The law judge reversed an order of the Administrator revoking respondent's air carrier operating certificate (ACOC) for alleged violations of sections 91.31(a), 135.63(c)(2), 135.25(a)(2), and 91.9 of the Federal

¹A copy of the decisional order and the law judge's comments incorporated by reference, both excerpted from the hearing transcript, are attached.

Aviation Regulations ("FAR," 14 C.F.R. Parts 91 and 135).²

On appeal, the Administrator contends that the law judge erred in not affirming the revocation of respondent's ACOC.

After consideration of the briefs of the parties and the record below, the Board concludes that safety in air commerce or air transportation and the public interest require

²Sections 91.31(a), 135.63(c)(2), 135.25(a)(2), and 91.9 provide as follows:

"91.31 Civil aircraft flight manual, marking, and placard requirements.

(a) Except as provided in paragraph (d) of this section, no person may operate a civil aircraft without complying with the operating limitations specified in the approved Airplane or Rotorcraft Flight Manual, markings, and placards, or as otherwise prescribed by the certificating authority of the country of registry.

* * *

135.63 Recordkeeping requirements.

* * *

(c) For multiengine aircraft, each certificate holder is responsible for the preparation and accuracy of a load manifest in duplicate containing information concerning the loading of the aircraft. The manifest must be prepared before each takeoff and must include:

* * *

(2) The total weight of the loaded aircraft....

* * *

135.25 Aircraft requirements.

(a) Except as provided in paragraph (d) of this section, no certificate holder may operate an aircraft under this part unless that aircraft -

* * *

(2) Is in an airworthy condition and meets the applicable airworthiness requirements of this chapter, including those relating to identification and equipment.

* * *

§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

affirmation of the law judge's decision dismissing the Administrator's order of revocation.

The revocation order, filed as the complaint in this proceeding, alleged in pertinent part:

- "2. On February 22, 1988, Lang Enterprises operated Civil Aircraft N8049Q, a Cessna Model 403B multi-engine aircraft, under Part 135 of the Federal Aviation Regulations on a passenger carrying flight [from] Las Vegas, Nevada to the vicinity of Supai Village in the Grand Canyon area and return.
3. The flight was conducted using intentionally false passenger weights to make the aircraft appear to be within the maximum approved gross weight limit for the aircraft.
4. The aircraft departed Las Vegas at approximately 125 pounds over its maximum certificated gross weight.
5. By operating N8049Q over its maximum gross weight, Lang Enterprises failed to comply with the operating limitations specified in the aircraft's approved aircraft flight manual.
6. On the occasion referred to herein the aircraft's load manifest failed to include the total weight of the loaded aircraft.
7. The aircraft was operated in an unairworthy condition.
8. Operation of the aircraft in excess of its maximum gross weight limitation was reckless so as to endanger the life or property of another."

The law judge concluded that the allegations had not been proven by a preponderance of substantial, reliable evidence. He specifically refused to "draw an inference on top of an inference" because there was no documentary evidence to illustrate that the weights of the passengers as originally recorded were erroneous.

The facts, in brief, are as follows: Before one of

respondent's sightseeing flights departed, it was customary for the passengers to be weighed to insure that the aircraft did not exceed its permissible gross weight. A Lang employee testified that she performed this task on February 22, 1988, prior to the flight in question, recorded the weights, and gave the list to the Lang chief executive officer (CEO). The CEO testified that he recopied the figures onto another slip of paper because the original list was too sloppy.³ He further claims that, at his request, another Lang employee delivered the recopied list to the pilot.⁴

The pilot testified that before loading the airplane, he asked the passengers to step forward when he called out their weights as they appeared on his list, then called out two weights, but no one stepped forward.⁵ A passenger testified

³The CEO stated that the original list contained nine passengers. He determined that, due to the weight restrictions, one had to be eliminated from the list. In addition, one passenger was advised to leave his video equipment, weighing 25 pounds, behind. He then subtracted this amount from that passenger's recorded weight.

There was a 100-pound removable ballast in the nose of the aircraft that remained untouched.

⁴The pilot contradicts this, stating that he went inside and obtained the list directly from the CEO.

⁵Only one of the eight passengers testified at the hearing. She stated that a female employee weighed each passenger and recorded the numbers. According to this witness, the pilot called out three or four weights before the flight, but no one stepped forward. He then assigned seats to the passengers and commented on the discrepancy, stating "I'll have to speak to someone when I come back."

The passenger/witness stated that she heard "144 pounds" called out when she was weighed. This number, however, matches neither the number on the paper handed to the pilot, nor the allegedly-corrected number subsequently recorded by

that the pilot remarked that he was going to speak to someone about this when they returned, yet the pilot testified that, at this point, he had no reason to question the accuracy of the weight list he had been given.⁶ He proceeded with the flight.

After landing, the pilot claims that he asked the passengers to repeat the weights they heard called out when they were weighed before the flight. The figures relayed to him did not match those written on his list.⁷ He recorded the new weights and determined that the aircraft had been

(..continued)

the pilot. Regarding the weighing-in procedure, the passenger could not say definitively that any of the other passengers' weights had been called out as they were recorded. When asked whether her husband's weight was repeated out loud by the clerk, the passenger stated, "I believe she did the same for him, or else he knew how much he weighed." Transcript at 47.

⁶The pilot maintained that before the flight, the chief pilot told him the number of passengers had been reduced from nine to eight in order to keep the weight down, and then advised him that "there might be something where [the woman recording the weights] might try and put more weight on there or somebody, you know. I don't remember the exact words, but basically he told me to keep my eyes open. He was real forward about it. He said, 'Don't let them pull a stunt on you.'" Transcript at 19.

Although the chief pilot testified at the hearing, no one asked him whether he made this statement to the pilot and, if so, why.

⁷The pilot insisted that the passengers relayed the weights that they heard called out when they each stepped onto the scale, not what they each thought they weighed. This is arguable, however, as two passengers, who according to the pilot did not speak English, gave their weights in kilos, which he then converted to pounds. It was revealed through uncontroverted testimony that respondent's scale displayed a person's weight only in pounds.

about 125 pounds over gross weight.⁸

The law judge found that the evidence adduced at the hearing was insufficient to support the Administrator's charges. He reasoned that he could not uphold the charges because it was impossible to determine what the weights originally were and whether the CEO copied the numbers exactly as they appeared on the original document or changed them when he transferred the figures from one page to the other.

We agree that the Administrator did not establish the violations by a preponderance of the evidence. There are several factual inconsistencies in the witnesses' testimony, as previously discussed, and the record does not show whether the original weights were, in fact, incorrect and if they were, whether the numbers allegedly elicited by the pilot accurately represented the passengers' weights. While it is true that "the prohibition against operating an unairworthy aircraft applies whether or not the operator has had the discrepancies brought to its attention,"⁹ the basic premise that the aircraft was unairworthy must first be established.

In addition, without evidence that the weights were erroneously recorded and the aircraft took off when it was over maximum gross weight, it is impossible to determine

⁸The flight manifest listed maximum takeoff weight of the aircraft as 6300 pounds, with an actual weight of 6268.

⁹Administrator v. Eagle Commuter Airlines, Inc., 5 NTSB 1106, 1108 (1986).

whether respondent deliberately altered the figures to make the aircraft appear under the weight limitation. The charges as set forth in the complaint were not established with sufficient proof.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is denied;
2. The initial decision is affirmed.

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.